Supreme Court U.S.
FILED

No. 061081 FEB 01 2007

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In The

Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

WILLIAM R. VANDELFT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does *Apprendi v. New Jersey*, 530 U.S. 466 (2000), apply to consecutive sentences where each sentence, standing alone, was authorized by the jury's verdict?

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PETITION FOR A WRIT OF CERTIORARI

The Spokane County Prosecuting Attorney, on behalf of the people of the State of Washington, respectfully petitions for a writ of *certiorari* to review the judgment of the Supreme Court of Washington in this case.

OPINION BELOW

The opinion of the Washington Supreme Court is reported at *In re Personal Restraint Petition of William R. VanDelft*, 158 Wn.2d 731, 147 P.3d 573 (Wash. 2006). *See* Appendix (App.) at 1-17. The decision by the Court of Appeals Chief Judge is not reported, and is reproduced at App. 18-20.

JURISDICTION

The Washington Supreme Court's judgment was entered on November 30, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents questions under the Sixth and Fourteenth Amendments of the Federal Constitution.

STATEMENT OF THE CASE

Respondent/defendant William VanDelft was charged in Spokane County (Washington) Superior Court with six

different crimes: one count of Second-Degree Kidnapping, two counts of Communication with a Minor for Immoral Purposes, two counts of Attempted First-Degree Kidnapping, and one count of Intimidation with a Dangerous Weapon. The crimes encompassed five different incidents over a four month period wherein VanDelft tried to lure or capture young boys in public locations in Spokane. The three kidnappings, which are classified as felonies under Washington law, were alleged to have been committed with sexual motivation. The remaining charges are gross misdemeanors. The jury convicted on all counts as charged.

The trial judge imposed consecutive standard range sentences on all counts, declaring an exceptional sentence in order to run the Second-Degree Kidnapping charge consecutive to the two other kidnapping charges. In his view, a concurrent term on the Second-Degree Kidnapping would leave that count unpunished. *See* App. at 21-22. On appeal, the defendant challenged only his convictions; there was no challenge to the exceptional sentence. The Washington Court of Appeals, Division Three, affirmed the convictions in an unpublished opinion, and the Washington Supreme Court denied review. *State v. VanDelft*, 118 Wn. App. 1071, 2003 Wash. App. LEXIS 3221 (2003), *review denied* 151 Wn.2d 1026, 94 P.3d 960 (Wash. 2004). This Court denied a petition for *certiorari*. *VanDelft v. Washington*, 543 U.S. 960 (2004).

VanDelft *pro se* then filed a personal restraint petition pursuant to Rules of Appellate Procedure (RAP) 16.3, challenging the exceptional sentence on the second degree kidnapping count based on *Blakely v. Washington,* 542 U.S. 296 (2004). The Chief Judge dismissed the case as untimely without giving notice to the prosecution. *See* App.

at 18-20. The Washington Supreme Court granted review, appointed counsel for VanDelft, and reversed the dismissal by a seven-to-two vote. The majority concluded that under *Blakely v. Washington* only a jury could determine whether a "free crime" resulted in a sentence that was "clearly too lenient." To the majority, it was the nature of the fact-finding, not the sentence, which required application of *Blakely*. *See* App. at 7-13. The dissenting justices contended that whether *Blakely v. Washington* applied "is determined by examining each sentence in isolation – not by examining an amalgamation of those sentences." *See* App. at 16.

REASONS FOR GRANTING THE PETITION

This Court has never decided whether *Apprendi v. New Jersey* or *Blakely v. Washington* prohibits a judge from imposing consecutive sentences where the sentence imposed on each individual count was a sentence authorized by the jury's verdict on that count. There is a significant conflict among state and federal appellate courts on this question. Indeed, the majority and dissenting opinions of the Washington Supreme Court in this case mirror the fundamental split of views in the state and federal appellate courts. The question was squarely raised and resolved by the Washington Supreme Court, and there is no independent state grounds – statutory or constitutional – for the court's decision. Thus, this case is an appropriate vehicle for deciding this important question under the Sixth Amendment as interpreted in *Apprendi*. Supreme Court Rule 10(b) and (c).

This Court in *Apprendi v. New Jersey* held that the Sixth Amendment requires that no sentence may be imposed unless the jury has found the facts which authorize the sentence. This Court rejected an argument by the prosecution that the enhanced sentence at issue in *Apprendi* was permissible because the trial court could have achieved the same sentence by running two other sentences consecutively, thus making the enhanced sentence within the range authorized by statute. This Court held that the proper focus was, instead, on whether the sentence imposed on the individual count was authorized by the jury's verdict.

> The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count. The finding is legally significant because it increased – indeed, it doubled – the maximum range within which the judge could exercise his discretion, converting what was otherwise a maximum 10-year sentence on that count into a minimum sentence. The sentences on counts 3 and 22 have no more relevance to our disposition than the dismissal of the remaining 18 counts.

530 U.S. at 474.

After *Apprendi*, state and federal appellate courts consistently read this passage to mean that the rule of *Apprendi* does not apply to findings that authorized consecutive sentences. *United States v. McWaine*, 290 F.3d 269, 274 (5th Cir. 2002), *cert. denied* 537 U.S. 921 (2002); *United States v. Parolin,* 239 F.3d 922, 930 (7th Cir. 2001), *cert. denied* 537 U.S. 921 (2001); *United States v. Hernandez*, 330 F.3d 964, 982 (7th Cir. 2003), *cert. denied* 541 U.S.

904 (2003); *United States v. Diaz*, 296 F.3d 680, 684 (8th Cir. 2002), *cert. denied sub nom. Lohr v. United States,* 537 U.S. 1095 (2002); *United States v. Harrison*, 340 F.3d 497, 500 (8th Cir. 2003); *United States v. Buckland*, 289 F.3d 558, 572 (9th Cir. 2002), *cert. denied* 535 U.S. 1105 (2002); *United States v. Chorin*, 322 F.3d 274, 278-279 (9th Cir. 2003), *cert. denied sub nom. Caden v. United States,* 540 U.S. 857 (2003); *United States v. Lott,* 310 F.3d 1231, 1242-1243 (10th Cir. 2002), *cert. denied* 538 U.S. 936 (2003); *United States v. Ramsey*, 329 F.3d 1250, 1254-1255 (11th Cir. 2003), *cert. denied sub nom. Davis v. United States*, 540 U.S. 925 (2003); *United States v. Lafayette,* 337 F.3d 1043, 1049 n. 11 (D.C. Cir. 2003); *State v. Bramlett*, 237 Kan. 67, 41 P.3d 796 (Kan. 2002); *State v. Wagener*, 196 Ill. 2d 269, 752 N.E.2d 430 (Ill. 2001), *cert. denied* 534 U.S. 1011 (2001); *State v. Jacobs*, 644 N.W.2d 695, 699 (Iowa 2001); *State v. Higgins*, 149 N.H. 290, 821 A.2d 964, 975-976 (N.H. 2003).

The question of *Apprendi's* application to multiple sentences arose again after *Blakely v. Washington*. The majority of the states that looked at the issue concluded that *Blakely* had not changed *Apprendi* on this point. *State v. Abdullah,* 184 N. J. 497, 514, 878 A.2d 746 (N. J. 2005); *People v. Black,* 25 Cal. 4th 1238, 1261-1264, 29 Cal. Rptr. 3d 740, 113 P.3d 534 (Cal. 2005); *Smylie v. State,* 823 N.E.2d 679, 686 (Ind. 2005), *cert. denied* 126 S. Ct. 545 (2005) [*Blakely* did not affect decision to impose consecutive rather than concurrent sentences even where judge must find aggravating factor]; *Marrow v. State,* 169 S.W.3d 328, 330-331 (Tex. App. 2005), *cert. denied* 126 S. Ct. 1147 (2006); *State v. Senske*, 692 N.W.2d 743, 748-749 (Minn. App. 2005), *review denied* 2005 Minn. LEXIS 302 (2005) [*Blakely* did not apply to permissive consecutive terms];

Vandegriff v. State, 125 P.3d 360, 361-363 (Alaska App. 2005); *State v. Tanner*, ___ P.3d ___, 2006 Ore. App. LEXIS 1965 (Ore. App., December 20, 2006). The Third Circuit likewise revisited the issue after *Blakely* and determined that the *Apprendi* rule still did not apply to aggregate sentences. *United States v. Dees*, 467 F.3d 847, 854 (3rd Cir. 2006). Indeed, even the Washington Supreme Court appeared to have ruled that *Blakely* and *Apprendi* had no application to the ordering of multiple sentences when considering a challenge to a different section of Washington's Sentencing Reform Act. *State v. Cubias,* 155 Wn.2d 549, 120 P.3d 929 (Wash. 2005); *State v. Louis,* 155 Wn.2d 563, 120 P.3d 936 (Wash. 2005).

The majority of the Washington Supreme Court in this case looked to the factual nature of the finding that had to be made – the effect of the free crime was to result in a sentence that was clearly "too lenient" – and decided that the *Blakely* factual test governed even in the situation of the ordering of multiple sentences. App. A at 12. The Ohio Supreme Court reasoned similarly in *State v. Foster,* 109 Ohio St. 3d 1, 21-22, 845 N.E.2d 470 (Oh. 2006), ruling that the factual finding required to impose consecutive sentences violated *Blakely*.

The Ohio and Washington Supreme Court rulings conflict with the rulings of the Supreme Courts of California, Illinois, Indiana, Iowa, Kansas, and New Jersey in applying *Apprendi* and *Blakely.* Washington and Ohio also are in conflict with the noted decisions of the Third, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits. Unlike some other post-*Apprendi* issues, the uncertainty in the law on this question will persist, as a number of federal and state courts continue to permit judges to impose consecutive sentences. And, if the

law is not clarified, some states – like Washington – will be forced to amend their sentencing laws and empanel juries where not constitutionally required. Thus, this Court should take review to resolve the conflicts. Review is therefore appropriate pursuant to Rule 10(b) and (c).

CONCLUSION

The ordering of consecutive sentences does not fall within the scope of *Apprendi v. New Jersey* and *Blakely v. Washington*. This Court should grant review to answer the important federal question presented concerning the scope of those cases and to resolve conflicts among the state courts. Rule 10(b) and (c).

Respectfully submitted,

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IN THE SUPREME COURT
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In the Matter of the Personal Restraint Petition of William Raymond VanDelft, Petitioner.	NO. 77733-1 filed November 30, 2006

Bridge, J. – William VanDelft was convicted of six crimes arising from five incidents in which he initiated contact with different boys and propositioned them for sex, using varying degrees of threats or violence. In this personal restraint petition, his second, VanDelft argues that the trial court's sentencing violated *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), by requiring VanDelft's sentence for kidnapping in the second degree with sexual motivation (count 1) to be served consecutively to his sentences for all other counts pursuant to RCW 9.94A.589(1)(a). We hold that since VanDelft's judgment and sentence became final after *Blakely* was decided and the principles announced in *Blakely* apply to consecutive sentences imposed under RCW 9.94A.589(1)(a), the trial court erred when it imposed count 1 consecutively because the trial judge, not the jury, found that a concurrent sentence would be clearly too lenient.

I

Statement of Facts and Procedural History

VanDelft was convicted by a jury on April 3, 2002 in Spokane County Superior Court of one count of kidnapping in the second degree with sexual motivation (count 1),

two counts of attempted kidnapping in the first degree with sexual motivation (counts 3 and 6), two counts of communication with a minor for immoral purposes (counts 2 and 4), and one count of intimidation with a dangerous weapon (count 5). The kidnapping and attempted kidnapping convictions were felonies, while the others were gross misdemeanors. RCW 9.41.270; RCW 9.68A.090; RCW 9A.40.020, .030; RCW 9A.28.020. The jury returned special findings of sexual motivation on the kidnapping and attempted kidnapping charges. The jury also returned special verdicts finding VanDelft used a deadly weapon other than a firearm when committing the second degree kidnapping and one of the attempted first degree kidnappings.

The convictions were based on five separate incidents that occurred between June 13 and September 12, 2001. *State v. VanDelft,* noted at 118 Wn. App. 1071, 2003 Wash. App. LEXIS 2364, at *2, *review denied,* 151 Wn.2d 1026, *cert. denied,* 543 U.S. 960 (2004).[1] The incidents involved five boys, 11 to 14 years old, and took place at various locations around Spokane. In the only incident at issue here, VanDelft struck up a conversation with an 11-year-old and offered him a ride. VanDelft then grabbed the boy and pulled out a knife, but the boy was able to run away. VanDelft chased the boy and managed to pin him down, but the boy escaped again. For this incident, VanDelft was

[1] In each incident, VanDelft engaged the boy in conversation and then attempted to lure or threaten the boy into his car. In some cases he explicitly asked for or demanded sexual favors, and in some cases he used a knife or gun to threaten violence if the boy refused to comply. *VanDelft,* 2003 Wash. App. LEXIS 2364, at *1-4 n.1-n.4.

convicted of kidnapping in the second degree with sexual motivation (count 1).

VanDelft was sentenced on July 12, 2002. The sentence for each individual crime was within its standard sentencing range. RCW 9.94A.589(1)(b) expressly required the court to run the sentences for the two attempted first degree kidnapping counts consecutively because they are statutorily defined as serious violent offenses. The court also ordered the sentences for the second degree kidnapping (96 months for count 1) and the three gross misdemeanors to run consecutively to each other and to all other charges. The result was that each sentence would be served consecutively for a total of 315 months.

To support its conclusion that count 1 would be served consecutively to the other felony sentences even though it was not a serious violent offense, the trial judge entered findings of fact and conclusions of law. The judge found that the jury returned special verdicts finding sexual motivation on each of counts 2, 3, and 6 and deadly weapon enhancements on counts 1 and 6. He found that the defendant had an offender score of 15 on each of the three felony convictions. He found the sentences in the two attempted first degree kidnapping convictions would necessarily run consecutive to each other by operation of RCW 9.94A.589(1)(b). Finally, he found

> [t]hat given the defendant's offender score and that the crimes involved several distinct criminal acts against five different victims, a concurrent sentence on Count I to the two serious violent offenses in Counts III and VI, would fail to hold the defendant accountable for all of the crimes for which he was convicted, since he would serve no additional time for Count I.

Findings of Fact and Conclusions of Law at 2. The court then ruled that a concurrent sentence on count 1 would result in a sentence that was "clearly too lenient" and determined that the sentence for count 1 would run consecutive to all other counts in this case. *Id.* at 3.

VanDelft appealed his convictions but not his sentence. *VanDelft*, 2003 Wash. App. LEXIS 2364, at *1. The Court of Appeals affirmed VanDelft's convictions in an unpublished opinion on October 16, 2003, and this court denied his petition for review on June 2, 2004. *Id.*; *State v. VanDelft,* 151 Wn.2d 1026, 94 P.3d 960 (2004). The Court of Appeals issued its mandate terminating review on June 16, 2004. In the meantime, in February 2004, VanDelft filed his first personal restraint petition in the Court of Appeals. That petition was dismissed on July 1, 2004. In his direct appeal, VanDelft had also filed a petition for writ of certiorari in the United States Supreme Court on June 25, 2004, which was ultimately denied on November 1, 2004. *VanDelft v. Washington,* 543 U.S. 960, 125 S. Ct. 417, 160 L. Ed. 2d 325 (2004).

VanDelft, acting pro se, filed his second personal restraint petition at the Court of Appeals in February 2005, arguing his sentence violated *Blakely.* The Chief Judge of the Court of Appeals dismissed this personal restraint petition, relying on *State v. Evans,* 154 Wn.2d 438, 448-49, 114 P.3d 627, *cert. denied,* 126 S. Ct. 560 (2005), in which we held that *Blakely* does not apply retroactively to convictions already final when *Blakely* was decided. VanDelft then filed a motion for discretionary review in this court seeking review of the order dismissing his petition, which was granted.

II

Analysis

VanDelft argues that his convictions were still pending on review and not yet final when *Blakely* was decided. He asserts that the principles set forth in *Blakely* must be applied to his sentence, and he contends that the imposition of an exceptional consecutive sentence under RCW 9.94A.589(1)(a) violates *Blakely.* The State asserts that after this court's decision in *State v. Cubias,* 155 Wn.2d 549, 120 P.3d 929 (2005), *Blakely* does not apply to consecutive sentences that are otherwise within the standard range. The State also argues that VanDelft's petition should be barred because it is successive.

Finality: We have held that Blakely introduced a new rule of criminal procedure. *Evans,* 154 Wn.2d at 448. We apply a new rule for the conduct of criminal prosecutions retroactively "to all cases, state or federal, pending on direct review or not yet final." *In re Pers. Restraint of St. Pierre,* 118 Wn.2d 321, 326, 823 P.2d 492 (1992) (citing *Griffith v. Kentucky,* 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)). The Court of Appeals dismissed this personal restraint petition because the mandate on VanDelft's direct appeal was issued on June 16, 2004, but *Blakely* was not decided until June 24, 2004. Yet under Washington law, a judgment becomes final on the last of the following dates: when the judgment is filed with the clerk of the trial court, when the appellate court issues its mandate terminating direct review, *or* when "the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal." RCW 10.73.090(3); *see also Griffith,* 479 U.S. at 321 n.6. The United States Supreme Court denied VanDelft's petition for writ of certiorari on November 1, 2004,

more than four months after *Blakely* was decided, so VanDelft's direct appeal was still pending and not yet final when *Blakely* was decided. The Court of Appeals erred when it dismissed VanDelft's petition.

Successive Petition: In its answer to VanDelft's motion for discretionary review, the State contends that the Court of Appeals correctly dismissed this petition, VanDelft's second, because it is successive. Under either RCW 10.73.140 (which applies only to the Court of Appeals) or RAP 16.4(d) (which applies to this court), a successive petition for similar relief must be dismissed absent good cause shown. *In re Pers. Restraint of Stoudmire,* 145 Wn.2d 258, 262-63, 36 P.3d 1005 (2001). Yet this is true only where the relevant issue was previously heard and determined on the merits. *Id.* at 263. In addition, a new issue cannot be raised in a successive petition to the Court of Appeals without a showing of good cause for the failure to raise the issue earlier. RCW 10.73.140.[2]

When VanDelft filed his first personal restraint petition in February 2004, *Blakely* had not yet been decided. An intervening change in the law material to the petitioner's case can amount to good cause for a successive petition, and as noted above, *Blakely* announced a new rule. *Evans,* 154 Wn.2d at 448; *In re Pers. Restraint of Crabtree,* 141 Wn.2d 577, 583, 9 P.3d 814 (2000). Thus, Van Delft's personal restraint petition cannot be dismissed

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[2] New issues in successive petitions are barred in this court by way of the abuse of the writ doctrine, which applies only where the petitioner has been represented by counsel throughout postconviction proceedings. In addition, the doctrine does not apply where the new issue is based on an intervening change in the law. *In re Pers. Restraint of Stenson,* 153 Wn.2d 137, 144-45, 102 P.3d 151 (2004).

as successive because it raised a new issue not previously heard and determined on the merits, and there was good cause for not raising the issue previously. We therefore proceed to consider the merits of VanDelft's petition.

Blakely *Challenge to the Consecutive Sentence for Count 1*: VanDelft contends that the imposition of an exceptional consecutive sentence under RCW 9.94A.589(1)(a) violates the principles set forth in *Blakely*. RCW 9.94A.589 determines whether multiple felony convictions are sentenced concurrently or consecutively. Under RCW 9.94A.589(1)(b) (hereinafter (1)(b)), sentences for separate and distinct serious violent offenses, including attempted first degree kidnapping, "shall be served consecutively to each other and concurrently with sentences [for other felonies] imposed under (a) of this subsection." *See also* RCW 9.94A.030(41). Felonies that are not serious violent offenses "shall be served concurrently" under RCW 9.94A.589(1)(a) (hereinafter (1)(a)). Consecutive sentences for (1)(a) crimes may be imposed only "under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a).[3] Second degree kidnapping, the offense at issue here, is not a serious violent offense, and therefore (1)(a) governs sentencing for that crime. RCW 9.94A.030(41).

RCW 9.94A.535 reiterates that a departure from the presumption of concurrent sentences for nonserious violent felonies is an exceptional sentence. At the time

[3] Ordinarily, the multiplicity of separate and distinct nonserious violent felonies is accounted for under (1)(a) when each count is considered as criminal history with respect to the others, increasing the offender score for each count for purposes of calculating the standard range for each offense. RCW 9.94A.589(1)(a); *State v. Batista*, 116 Wn.2d 777, 783, 808 P.2d 1141 (1991).

that VanDelft was sentenced, the illustrative factors listed in RCW 9.94A.535 that could support an exceptional sentence without additional jury findings included "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter." Former RCW 9.94A.535(2)(i) (2002).

In this case, counts 3 and 6 (attempted first degree kidnapping with sexual motivation) were properly classified as separate and distinct serious violent offenses, and VanDelft concedes that they were appropriately sentenced consecutively under (1)(b). Pet'r's Suppl. Br. at 7-8. VanDelft also concedes that the statutory presumption of concurrent sentencing contained in (1)(a) does not apply to gross misdemeanors, and he does not challenge the consecutive sentencing for the three gross misdemeanors in this case.[4] *Id.* The consecutive sentence for count 1 (96 months for second degree kidnapping with sexual motivation) is the only portion of VanDelft's sentence affected by his current petition. *Id.* at 8.

The trial court imposed an exceptional consecutive sentence pursuant to (1)(a) for count 1 based on its conclusion that concurrent sentencing would "fail to hold [VanDelft] accountable for all of the crimes for which he was convicted." Findings of Fact and Conclusions of Law at 2. VanDelft's offender score was at least 15 based on his

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[4] The maximum imprisonment for gross misdemeanors is one year where the punishment is not otherwise fixed by statute. RCW 9.92.020. The Sentencing Reform Act of 1981 (chapter 9.94A RCW), including RCW 9.94A.589, does not apply to misdemeanors. RCW 9.94A.010; *State v. Snedden*, 149 Wn.2d 914, 922, 73 P.3d 995 (2003); *State v. Whitney*, 78 Wn. App. 506, 517, 897 P.2d 374 (1995).

criminal history and the multiple current offenses, but the maximum offender score accounted for on the sentencing grid was 9. Report of Proceedings at 409; RCW 9.94A.510. As a result, VanDelft would receive no additional punishment for count 1 if it were served concurrently to the others. The trial judge concluded that concurrent sentencing for count 1 was therefore "clearly too lenient." Findings of Fact and Conclusions of Law at 3.

In *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely,* the Court explained that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely,* 542 U.S. at 303. In other words, the "statutory maximum" is the maximum that a judge may impose "*without* any additional findings." *Id.* at 304.

In *Cubias,* this court discussed the impact of *Apprendi* and *Blakely* on consecutive sentencing determinations made pursuant to (1)(b). 155 Wn.2d at 550. In that case, the jury found Cubias guilty of three counts of attempted murder in the first degree. *Id.* Because the three counts were charged based on three different victims, the trial court imposed consecutive sentences for each count pursuant to (1)(b), which presumes consecutive sentences for serious violent offenses so long as the charges arose out of "'separate and distinct criminal conduct.'" *Id.* (quoting (1)(b)). Cubias argued the imposition of consecutive sentences in his case violated *Apprendi* and *Blakely* because

the trial judge, not the jury, found that the three counts of attempted murder constituted separate and distinct criminal conduct. *Id.* at 550-51. We held that the principle set forth in *Apprendi* and *Blakely* did not apply and upheld the sentences imposed by the trial court. *Id.* at 551.

We explained that "in both *Blakely* and *Apprendi,* the United States Supreme Court was directing its attention to the sentence on a *single* count of a multiple-count charge." *Id.* at 553. Because the *Apprendi* Court contemplated only whether the sentence for a single count exceeded the statutory maximum, we reasoned that "*Apprendi* does not have any application to consecutive sentences; to conclude otherwise would extend *Apprendi's* holding beyond the narrow grounds upon which it rested." *Id.* at 554. We similarly reasoned that the *Blakely* Court was not concerned with consecutive sentences. *Id.* (citing *Blakely,* 542 U.S. at 299 n.2). Even so, we also emphasized that Cubias had no entitlement under (1)(b) to serve concurrent sentences for multiple serious violent offenses. *Id.* at 554-55. Furthermore, in discussing a similar Court of Appeals case, we noted that the imposition of consecutive sentences under (1)(b) does not operate to elevate crimes to the equivalent of a greater offense. *Cubias,* 155 Wn.2d at 555 (discussing *State v. Kinney,* 125 Wn. App. 778, 106 P.3d 274 (2005)). We concluded that a trial court's imposition of consecutive sentences under (1)(b) "does not increase the penalty for any single underlying offense beyond the statutory maximum provided for that offense and, therefore, does not run afoul of . . . *Apprendi* and *Blakely*." *Id.* at 556.

Then, in *State v. Louis,* 155 Wn.2d 563, 572, 120 P.3d 936 (2005), the companion case to *Cubias* and another (1)(b) case, we reiterated:

> the principle set forth in *Apprendi* and *Blakely* has no application to consecutive sentencing decisions so long as each individual sentence remains within the statutory maximum for that particular offense.

VanDelft argues that the *Cubias* rule should not apply to charges sentenced under (1)(a) because (1)(a) presumes sentences will be served concurrently and the presumption can be overcome only by a finding of an aggravating factor under RCW 9.94A.535. VanDelft is correct that the operative distinction between (1)(a) and (1)(b) is that under (1)(a) the defendant enjoys a statutory presumption of concurrent sentencing, but under (1)(b) he does not. In *Cubias* we emphasized that "[a] defendant has no right to serve concurrent sentences for committing multiple serious violent offenses [under (1)(b)]," but here VanDelft did enjoy a presumption of a concurrent sentence for count 1. 155 Wn. 2d at 555. Indeed, the *Blakely* Court spoke in terms of the sentencing limits which a defendant is entitled to expect based on the jury verdict. *See Blakely,* 542 U.S. at 309. Unlike *Cubias,* the facts found by the trial judge in this case went beyond the jury verdict and changed the nature of the sentence that the defendant was entitled to expect for count 1 from concurrent to consecutive. The trial judge's findings operated to elevate the punishment for a nonserious violent offense to the realm of punishment for serious violent offenses based on facts not reflected in the jury's verdict. *See Blakely,* 542 U.S. at 303; *Apprendi,* 530 U.S. at 494; *Kinney,* 125 Wn. App. at 783.

More importantly, there is no dispute that the legislature has characterized consecutive sentences imposed under (1)(a) as exceptional, requiring a finding of an aggravating factor for support. RCW 9.94A.535. In fact, in

order to overcome the presumption of concurrent sentencing in (1)(a), the sentencing judge in this case employed the very exceptional sentencing scheme at issue in *Blakely*. *Blakely*, 542 U.S. at 299; RCW 9.94A.535. Moreover, there is no dispute that in *State v. Hughes*, 154 Wn.2d 118, 140, 110 P.3d 192 (2005), we held "[t]he conclusion that allowing a current offense to go unpunished is clearly too lenient is a factual determination that *cannot* be made by the trial court following *Blakely*."

Given (1)(a)'s presumption of concurrent offenses and the exceptional nature of a consecutive sentence imposed for a nonserious violent felony, we conclude that the rule announced in *Cubias* applies only to consecutive sentences imposed under (1)(b). We hold that because (1)(a) requires the trial court to look to the exceptional sentencing scheme in RCW 9.94A.535 in order to impose a consecutive sentence for a nonserious violent felony, *Blakely* and *Hughes* squarely apply to consecutive sentencing decisions under (1)(a). Here the trial judge found that a concurrent sentence for count 1 would be clearly too lenient, a fact not reflected in the jury verdict, in violation of *Blakely* and *Hughes*. We reverse the Court of Appeals, grant the petition, and remand to the trial court for resentencing of count 1 concurrent with the other counts. *See Hughes*, 154 Wn.2d at 156 (remanding for resentencing within the standard range).[5]

---

[5] The United States Supreme Court recently held that *Blakely* error can be subject to harmless error analysis. *Washington v. Recuenco*, 548 U.S. ___, 126 S. Ct. 2546, 2553, 165 L. Ed. 2d 466 (2006). However, because the State has never argued harmless error in this case, we decline to address that issue here.

III

Conclusion

Because VanDelft's appeal was still pending and not yet final when *Blakely* was decided, his petition asserting a *Blakely* violation was improperly dismissed by the Court of Appeals. His petition is not successive. The trial court here imposed an exceptional sentence when it ordered VanDelft's sentence for count 1 to be served consecutively, and thus *Cubias* is inapplicable. The exceptional consecutive sentence for count 1 was based on facts found by the trial judge and not reflected in the jury verdict, in violation of *Blakely* and *Hughes*. We reverse the Court of Appeals, grant the petition, and remand for resentencing of count 1.

AUTHOR:

Justice Bobbe J. Bridge

WE CONCUR:

Justice Tom Chambers

Justice Charles W. Johnson

Justice Susan Owens

Justice Barbara A. Madsen

Justice Mary E. Fairhurst

Justice Richard B. Sanders

In re Pers. Restraint of VanDelft
Dissent by Alexander, C.J.

No. 77733-1

ALEXANDER, C.J. (dissenting) – The majority holds that the "*Cubias* rule" should not apply in this case. *See State v. Cubias,* 155 Wn.2d 549, 120 P.3d 929 (2005). In reaching its decision, it observes, "[William] VanDelft is correct that the operative distinction between [RCW 9.94A.589] (1)(a) and (1)(b) is that under (1)(a) the defendant enjoys a statutory presumption of concurrent sentencing, but under (1)(b) he does not." Majority at 12. Because I am unable to find an "operative distinction" between RCW 9.94A.589(1)(a) and (1)(b), I see no reason why our decision in *Cubias* does not control our review of VanDelft's sentence. Accordingly, I dissent.

In *Cubias,* we held that a trial court could impose consecutive sentences without a separate finding by a jury as to whether each count was separate and distinct. Majority at 10 (citing *Cubias,* 155 Wn.2d at 550). In affirming Cubias's sentence, we held that both *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) did not have any application to consecutive sentences. *Cubias,* 155 Wn.2d at 554. As the majority correctly observes, the imposition of consecutive sentences "'does not increase the penalty for any single underlying offense beyond the statutory maximum provided for that offense and, therefore, does not run afoul of . . . *Apprendi* and *Blakely.*'" Majority at 11 (quoting *Cubias,* 155 Wn.2d at 556).

In *Cubias,* we held that when a trial judge imposes consecutive sentences under (1)(b), he or she does not run afoul of *Blakely.* Here, we are faced with the question of whether a trial judge may impose consecutive sentences instead of a concurrent sentence under (1)(a). Thus, any departure from *Cubias* to invoke *Blakely* for sentences issued under (1)(a) depends upon finding a substantial difference between (1)(a) and (1)(b).

I am unable to find any difference between (1)(a) and (1)(b) that surmounts their similarities. The majority finds such a difference, indicating that "under (1)(a) the defendant enjoys a statutory presumption of concurrent sentencing, but under (1)(b) he does not." Majority at 12. It derives this presumption from the language of the two subsections. Concurrent sentences are "presumed" under (1)(a) because that provision says that consecutive sentences "may" be imposed, while concurrent sentences are *not* "presumed" under (1)(b) because that provision says that consecutive sentences "shall" be imposed.

For the majority, the difference between the two subsections, distilled to its essence, is a presumption of concurrent sentencing. Where the statute has a presumption of concurrent sentences under (1)(a), imposing consecutive sentences triggers *Blakely.* But, where the statute is *without* a presumption of concurrent sentencing under (1)(b), that is, where it allows for either a concurrent or consecutive sentence, imposing consecutive sentences does *not* trigger *Blakely.*

The flaw in the majority's reasoning is that our decision in *Cubias* did not turn upon what presumptions were found in (1)(b). It was not a critical factor. As noted above, *Cubias* turned upon a narrow reading of *Blakely.*

There, we affirmed the imposition of consecutive sentences because *Blakely* gave instructions as to the range of only *individual* sentences. As the majority noted, we said in *Cubias* that "'in both *Blakely* and *Apprendi,* the United States Supreme Court was directing its attention to the sentence on a *single* count of a multiple-count charge.'" Majority at 11 (quoting *Cubias,* 155 Wn.2d at 553).

I fail to understand how the presence of a presumption for concurrent sentences somehow reverses the analysis we used in *Cubias.* This point is underscored by the dissent in *Cubias.* In it, Justice Madsen took specific issue with our emphasis on the singular nature of the sentences involved in *Blakely* and *Apprendi. See Cubias,* 155 Wn.2d. at 558 (Madsen, J., dissenting) ("For Sixth Amendment purposes, there is no difference between an exceptional sentence that increases the length of a sentence for one count beyond the presumptive range and an exceptional *consecutive* sentence that increases the presumptive length of incarceration."). Her argument demonstrates the axis upon which *Cubias* turned: whether *Blakely* applies is determined by examining each sentence in isolation – not by examining an amalgamation of those sentences. Because *Cubias* did not turn upon the lack of a presumption of concurrent sentences, I fail to see how our analysis in it is reversed by the presence of such a presumption. I respectfully dissent.

AUTHOR:

Chief Justice Gerry L. Alexander

WE CONCUR:

Justice James M. Johnson

The Court of Appeals
of the
State of Washington
Division III

In the Matter of the Personal Restraint of:	)	**No. 23788-5-III**
WILLIAM RAYMOND VAN DELFT,	)	**ORDER LIFTING STAY AND DISMISSING PERSONAL RESTRAINT PETITION**
Petitioner.	)	(Filed Sep. 26, 2005)

William Raymond Van Delft seeks relief from personal restraint imposed following his July 19, 2002 Spokane County convictions for two counts of attempted kidnapping in the first degree and one count of kidnapping in the second degree, all with sexual motivation, two counts of communication with a minor for immoral purposes, and one count of intimidation with a dangerous weapon. The sentencing court ordered the sentences to run consecutively, resulting in an exceptional sentence of 315 months. Mr. Van Delft's convictions became final on June 16, 2004, when his direct appeal was mandated.

Relying on *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 2536-37, 159 L. Ed. 2d 403 (2004) (jury must determine beyond a reasonable doubt the existence of aggravating factors used to increase sentence above presumptive maximum set by legislature), Mr. Van Delft claims the sentencing procedure violated his Sixth Amendment right to trial by jury because a jury did not make the factual determinations supporting his exceptional sentence beyond a reasonable doubt.

After *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), every fact (other than the fact of a prior conviction) that increases the defendant's sentence beyond the statutory maximum may be used only if it was either proved beyond a reasonable doubt to the trier of fact at trial or admitted by the defendant. In *Blakely,* the Supreme Court clarified that "statutory maximum" does not refer to the maximum sentence authorized by the legislature, but for purposes of Washington's Sentencing Reform Act means the top of the standard sentencing range. *Blakely*, 124 S. Ct. at 2538.

We stayed this petition pending the Washington Supreme Court's decision in *State v. Evans,* 154 Wn.2d 438, 114 P.3d 627 (2005), as to whether *Apprendi* and/or *Blakely* applies retroactively to personal restraint petitioners whose convictions were final before the United States Supreme Court decided *Blakely* on June 24, 2004.

The Washington Supreme Court issued its decision in *Evans* on June 16, 2005, and a certificate of finality issued on August 25, 2005. This court therefore now lifts the stay in this petition.

The court in *Evans* held that neither *Apprendi* nor *Blakely* applies retroactively on collateral review to convictions that were final when those decisions were announced. *Evans,* 154 Wn.2d at 448-49. The holding in *Evans* forecloses Mr. Van Delft's challenge to his exceptional sentence.

Accordingly, the petition is dismissed pursuant to RAP 16.11(b). The court also denies Mr. Van Delft's request for appointed counsel. *See In re Pers. Restraint of Gentry,* 137 Wn.2d 378, 390, 972 P.2d 1250 (1999); RCW 10.73.150(4).

Costs will not be awarded to either party.

DATED: September 26, 2005

/s/ Kenneth H. Kato
KENNETH H. KATO
CHIEF JUDGE

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON Plaintiff, v. WILLIAM R. VAN DELFT, Defendant(s)	No.01-1-02317-0 FINDINGS OF FACT & CONCLUSIONS OF LAW ON EXCEPTIONAL SENTENCE (Filed Jul. 29, 2002)

THIS MATTER came on for sentencing on July 12, 2002, before the Honorable Richard Schroeder, the defendant was present as well as counsel for defendant, Jeff Compton, and counsel for the State of Washington, Dawn C. Cortez, Deputy Prosecuting Attorney. The court having in mind the testimony at trial, the exhibits admitted at trial, and having read the memorandum submitted by both parties, and having heard from Detective William Marshall, and representatives of the victims, as well as argument from both counsel, the Court now makes the following:

I. FINDINGS

1. The defendant was convicted of two counts of Attempted First Degree Kidnapping, one count of Second Degree Kidnapping, two counts of Communication with a Minor for Immoral Purposes and one count of Unlawful Display of a Weapon (also referenced in the materials as Intimidation with a Weapon);

2. The jury returned special verdicts finding sexual motivation on Counts I, III and VI and deadly

weapon, other than a firearm, enhancements on Counts I and VI;

3. That the defendant has an offender score of 15 on each of the three felony convictions;

4. That the sentences in the two Attempted First Degree Kidnapping conviction necessarily run consecutive to each other by operation of RCW 9.94A.589;

5. That given the defendant's offender score and that the crimes involved several distinct criminal acts against five different victims, a concurrent sentence on Count I to the two serious violent offences in Counts III and VI, would fail to hold the defendant accountable for all of the crimes for which he was convicted, since he would serve no additional time for Count I.

FROM the foregoing findings of fact, the Court makes the following conclusions of law:

III. CONCLUSIONS OF LAW

1. That a concurrent sentence on Count I to the other felony convictions would result in a sentence that is clearly too lenient

2. Therefore, the sentence in Count I shall run consecutive to all other counts in this case.

DATED this 26 day of July, 2002.

/s/ R.J. Schroeder
JUDGE
Richard J. Schroeder

Presented by:	As to Form Only:
/s/ Dawn C. Cortez	/s/ Jeff Compton
DAWN C. CORTEZ	Jeff Compton
Deputy Prosecuting Attorney	Attorney for the Defendant
WSBA # 27124	WSBA # 24082

NO. 06-1081

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2006

STATE OF WASHINGTON,

Petitioner,

vs.

William R. VanDelft,

Respondent.

On Petition for Writ of Certiorari to
The Supreme Court of Washington

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do *Apprendi v. New Jersey*[1] and its progeny apply to factual findings that were made by the judge – under certain circumstances in Washington's former sentencing system, in contrast to nearly ever other jurisdiction's – to increase a defendant's prison sentence by imposing consecutive sentences?

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[1] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

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JURISDICTION

The Washington Supreme Court issued its opinion on November 30, 2006. The state's petition was timely filed under 28 U.S.C. § 1254(1). The case is not final.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

RCW 9.94A.589(1)(a) states:

> Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection *shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.* ....

RCW 9.94A.589(1)(a) (emphasis added).

RCW 9.94A.589(1)(b) and (c) provide:

> (b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this

subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

Given the length of the other relevant statutory and constitutional provisions, they are included in the Appendix. *See* App. 01-15.

STATEMENT OF THE CASE

A. MR. VANDELFT WAS CONVICTED OF BOTH SERIOUS VIOLENT OFFENSES, WHICH PRESUMPTIVELY RUN CONSECUTIVELY, AND A NON-SERIOUS VIOLENT OFFENSE, WHICH PRESUMPTIVELY RUNS CONCURRENTLY

Mr. VanDelft was convicted of three gross misdemeanors and three felonies following a jury trial.[2] There were also special verdicts entered for

[2] The convictions were for: Count 1, kidnapping second degree with sexual motivation, in violation of RCW 9A.40.030; Count 2, communicating with a minor for immoral purposes, in violation of RCW 9.68A.090; Count 3, attempted kidnapping first degree with sexual motivation, in violation of RCW 9A.40.020(1)(b); Count 4, the gross misdemeanor of communicating with a minor as above; Count 5, intimidation with a dangerous weapon, in violation of RCW 9.41.270; Count 6, attempted kidnapping first degree with sexual motivation, in violation of 9A.40.020(1)(b).

use of a deadly weapon other than a firearm on Counts I and VI (per RCW 9.94A.125, .130).

The state sought consecutive sentences on each of the counts. On the gross misdemeanors, Counts 2, 4, and 5, it supported its request for consecutive sentences with argument about the severity of the crimes – since it did not need to provide any additional legal basis or factual finding prior to running those sentences consecutively. With regard to Counts 3 and 6, both for attempted kidnapping in the first degree, those are "serious violent" crimes under RCW 9.94A.030(40) (then subsection (37)) against different victims, so RCW 9.94A.589(1)(b) mandated that they run consecutively.[3]

But both parties recognized that Count 1, kidnapping in the second degree, was a non-"serious violent" offense and, hence, that it could not be run consecutively unless an "exceptional" sentence outside the statutory standard sentence range were imposed. That is what the dispute at sentencing was all about.

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[3] *Id.* ("Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level ... shall be determined [as follows] .... The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. *All sentences imposed under (b) of this subsection shall be served consecutively to each other* and concurrently with sentences imposed under (a) of this subsection.") (emphasis added).

B. THE TRIAL COURT AGREED WITH THE STATE THAT ADDITIONAL FACTS SUPPORTED AN EXCEPTIONAL SENTENCE, MADE FACTUAL FINDINGS SUPPORTING AN EXCEPTIONAL SENTENCE, AND RAN COUNT 1 CONSECUTIVELY

At sentencing on July 12, 2002, the state asked the court to run the sentence on Count 1 consecutively, as an exceptional sentence. It offered the following ground: "he's already committed so many crimes and done so much before and during this case that it [the standard range sentence] is clearly too lenient. The standard range is *clearly too lenient* to not have an exceptional imposed." (Emphasis added.)

The state Supreme Court in *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), *overruled in part on other grounds*, *Washington v. Recuenco*, 126 S.Ct. 2456 (2006), confirmed that a sentence above the standard range based on just such a finding that the standard range was "clearly too lenient" was indeed an exceptional sentence based on a factual finding subject to the protections of *Apprendi* and *Blakely*[4]. *Id.*, 154 Wn.2d at 136-37 ("This court has held that a judge may rely on the aggravating factor that the presumptive sentence is too lenient when 'there is some extraordinarily serious harm or culpability resulting from multiple offenses which would not otherwise be accounted for in determining the presumptive sentencing range.' ... We have

[4] *Blakely v. Washington*, 542 U.S. 296 (2004).

further defined that inquiry *to require a court to find one of two factual bases* to support the too lenient conclusion: '(1) "egregious effects" of defendant's multiple offenses [or] (2) the level of defendant's culpability resulting from the multiple offenses."'") (footnotes and citations omitted) (brackets in *Hughes*) (emphasis added).

The defense opposed this request but the court agreed with the state and ran Count 1 consecutively, as an exceptional sentence, after making the necessary "clearly too lenient" factual finding.

C. MR. VANDELFT'S CONVICTION WAS NOT YET FINAL WHEN *BLAKELY* WAS DECIDED, SO HE FILED A *PRO SE* PETITION FOR POST-CONVICTION RELIEF

The sentencing issue was not raised on direct appeal.

Mr. VanDelft, however, filed a *pro se* post-conviction petition – a personal restraint petition or PRP – arguing that imposition of this exceptional sentence on Count 1 triggered the protections of *Apprendi* and *Blakely*. Following a stay, the state appellate court dismissed because it said that his conviction was final before *Blakely* was decided. Order Lifting Stay and Dismissing Personal Restraint Petition (Sept. 26, 2005).

But the appellate court had its dates wrong, as Mr. VanDelft pointed out shortly after receipt of the appellate court's dismissal, in his Motion for Discretionary Review to the state Supreme Court (filed Oct. 3, 2005).

The state agreed with Mr. VanDelft on this procedural point. It acknowledged that "The defendant's facts and dates appear correct." Answer to Motion for Discretionary Review, p. 2. It conceded that this procedural grounds for dismissal of the PRP was wrong, stating: "The dismissal by the Court of Appeals was correct, even if not for the correct reasons." *Id.*

D. THE STATE SUPREME COURT GRANTED THE PRP AND REMANDED FOR RESENTENCING; THAT HAS NOT YET OCCURRED

The Washington Supreme Court granted the PRP. It ruled that the consecutive sentence at issue here was subject to *Apprendi* and *Blakely*. It remanded for resentencing. *In re the Personal Restraint of VanDelft*, 158 Wn.2d 731, 743, 147 P.3d 573 (2006) ("We reverse the Court of Appeals, grant the petition, and remand for resentencing of count 1.").

Resentencing has not yet occurred. On the date set for resentencing, the state moved the Superior Court for a stay of sentencing pending the outcome of this petition for writ of certiorari. The trial court granted this motion; resentencing is stayed and no resentencing date is set.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction over this case because there is no final judgment. The Washington Supreme Court "remanded for resentencing," and that has no yet occurred. The "remand[]" to a lower court means the case is

not final within the meaning of 28 U.S.C. § 1257. *O'Dell v. Espinoza*, 456 U.S. 430 (1982). Section A.

Even if the Washington Supreme Court's decision is final, it was based upon a statute that is somewhat unique. The only analog we have found is in Ohio. In those two jurisdictions, a statute mandates concurrent sentences for certain crimes and permits consecutive sentencing, as an exception, only if additional aggravating factors, over and above the facts inherent in the verdict or guilty plea, are found. In fact, the Washington Supreme Court has ruled that although *Apprendi Blakely* protections apply to consecutive sentencing under the statute at issue here, they do not apply to consecutive sentencing under other state statutes – thus underscoring the peculiarity of RCW 9.94A.589(1)(a), the statutory subsection at issue here. Section B.

Given the somewhat unique nature of this statute, petitioner has greatly overstated the extent of the conflict. Most of the cases it cites are based on completely different sentencing statutes – statutes giving judges complete discretion to impose concurrent or consecutive sentences without any additional factfinding. Section C.

The state does present a total of four states that have entered arguably conflicting decisions on the actual issue presented here – Washington and Ohio, on the one hand, and Indiana and Oregon, on the other. But all four

states – including Washington – have now changed their sentencing laws. They have either *Blakely*-ized (required jury determination of aggravating sentencing factors) or *Booker*[5]-ized (given judges unfettered discretion to increase sentences without additional factfinding) to cure any potential problems. The question presented thus lack ongoing significance. Section D.

In fact, the conflict presented by the Oregon case might go away with time. The defendant in that intermediate appellate court case has petitioned for state Supreme Court review. If review is granted, the perceived conflict might disappear completely. Section E.

REASONS FOR DENYING THE WRIT

A. THIS COURT LACKS JURISDICTION OVER THIS CASE BECAUSE THERE IS NO FINAL JUDGMENT.

The state seeks review of a sentencing issue. The Washington Supreme Court, however, "remanded for resentencing" on Count 1 and resentencing has not yet occurred. In fact, at the scheduled resentencing hearing, the state moved for a stay of sentencing pending the outcome of this petition – and it was granted.

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[5] *United States v. Booker*, 543 U.S. 220 (2005).

Since the case was remanded for resentencing and resentencing has not occurred, the case is not final.[6] The applicable state rule calls for issuance of a Certificate of Finality when a PRP is finally decided, and none has issued in this case.[7]

A judgment is not "final" under § 1257 (review by this Court of state-court decisions) if it "remand[s]" from a higher to a lower state court. *See, e.g., O'Dell v. Espinoza*, 456 U.S. 430 (1982) (*per curiam*) (dismissing for want of jurisdiction because Colorado Supreme Court remanded wrongful death case for trial). The Washington Supreme Court remanded this case for resentencing; hence it is not final.

There are exceptions to this rule of finality. For example, if all that is left on remand is a "ministerial" action that could not affect the issues on appeal, or if the "collateral order" doctrine's elements are satisfied, the case might still be considered final. *See Cox Broadcasting Corp. v. Cohn*, 420

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[6] The mandate issued in this PRP case on January 2, 2007, but no Certificate of Finality has issued.

[7] RAP 16.15(e), entitled "Certificate of Finality," provides, "The clerk of the Supreme Court issues the certificate of finality twenty days after the written opinion or order disposing of the petition is filed unless a motion for reconsideration of the decision is filed. If a motion for reconsideration is timely filed, the certificate of finality shall issue upon entry of an order denying the motion for reconsideration." No motion for reconsideration is pending, yet no Certificate of Finality has issued in this case (although the mandate has).

U.S. 469, 477-85 (1975); *Abood v. Detroit Board of Educ.*, 431 U.S. 209, 216 n.8 (1977).

None of those exceptions apply here. The resentencing is not merely ministerial. As discussed in more detail in Section D, below, much has changed since the date of the first *VanDelft* sentencing. Washington enacted a new set of sentencing laws responsive to *Blakely* on April 15, 2005, authorizing trial courts to convene juries to determine aggravating sentencing factors; the state Supreme Court ruled that those new sentencing laws applied retrospectively to many cases arising before the effective date of that act (*State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007)); and the state legislature immediately thereafter enacted an amendment to the earlier *Blakely*-responsive legislation that purports to apply those new sentencing laws, retrospectively, to an even broader category of criminal defendants. It is therefore anything but a foregone conclusion what arguments the state might raise at a new *VanDelft* sentencing. If it takes the position that it can seek consecutive sentences now anyway – and prevails – then the whole issue presented to this Court here would disappear.

Interpreting the state Supreme Court's remand for resentencing as a non-final order is also consistent with the general rule is that, "Final judgment in a criminal case means sentence. The sentence is the judgment."

Berman v. United States, 302 U.S. 211, 212 (1937). *Accord Burton v. Stewart*, 127 S.Ct. 793, 798-99 (2007) ("'Final judgment in a criminal case means sentence. The sentence is the judgment.' ... Accordingly, Burton's limitations period did not begin until both his conviction *and* sentence 'became final by the conclusion of direct review or the expiration of the time for seeking such review' which occurred well *after* Burton filed his 1998 petition.'") (citing *Berman*).

Since there is no final sentence, there is no final judgment in this state court case, and this Court lacks jurisdiction under § 1257. At the every least, this Court should decline the invitation to exercise jurisdiction because of the significant question presented about whether the state high court's decision on VanDelft's post-conviction petition was final, or not.

B. THE STATE SUPREME COURT PROPERLY HELD THAT *BLAKELY* APLIED HERE, BASED ON A STATUTE PECULIAR TO WASHINGTON

1. *Blakely* Applies To "Exceptional" Sentences Above The Standard Range

In *Blakely*, this Court ruled that its decision in *Apprendi* applied to exceptional sentences above the standard sentence range under Washington's Sentencing Reform Act (SRA): "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the*

defendant." *Blakely*, 542 U.S. at 303 (citations omitted).

2. RCW 9.94A.589(1)(a), Which Makes Imposition of a Consecutive Sentence for a Non-Serious Violent Offense "Exceptional" And Requires that it Be Based on Factual Findings, Applies Only to Certain Washington Consecutive Sentences

Under the somewhat unique sentencing statute applied to Mr. VanDelft, RCW 9.94A.589(1)(a), running Count 1 consecutively in Mr. VanDelft's case was an exceptional sentence. That statute provides that the sentence for a non-"serious violent" offense like the one in Count 1 "shall" run concurrently with other current sentences unless the "exceptional" sentence provisions of cross-referenced RCW 9.94A.535 are satisfied:

> Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection *shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.* ....

RCW 9.94A.589(1)(a) (emphasis added).

The cross-referenced RCW 9.94A.535 did not provide for a jury determination of the triggering factor by the beyond a reasonable doubt (as it, combined with new RCW 9.94A.537, does now). Instead, this sentence

over the *Blakely* statutory maximum – that is, the maximum imposed by RCW 9.94A.589(1)(a) – was based on additional factfinding done by the judge at sentencing under the then-applicable preponderance of evidence standard.

Since *Blakely* bars imposition of such exceptional sentences without the jury-trial and beyond-a-reasonable-doubt standard of proof mandated by *Apprendi*, the conclusion seems inescapable that Mr. VanDelft's sentence violated those controlling cases. The reason his sentence violates those cases, however, is because of RCW 9.94A.589(1)(a) – a statute peculiar to Washington, which makes consecutive sentences for specified offenses "exceptional" sentences that require additional factfinding, over and above the jury verdict (or guilty plea).

In fact, the peculiar nature of the statute at issue in this case is evident from the fact that the Washington Supreme Court does not treat all consecutive sentences as "exceptional" or subject to the protections of *Apprendi* and *Blakely* – only those imposed under this particular statutory subsection.

This is clear from the Washington Supreme Court's decisions in

Cubias[8] and *Louis*.[9] The state cites those cases as examples of Washington decisions which conflict with *VanDelft* because they decline to apply *Blakely* to consecutive sentences. But those cases interpreted a different statutory subsection, RCW 9.94A.589(1)(b), which mandates that sentences for "serious violent" offenses (as defined RCW 9.94A.030(40), formerly subsection (37)) that do not constitute "same criminal conduct" (as defined by RCW 9.94A.589(1)(a)[10]), "shall" run consecutively without any additional judicial factfinding. *VanDelft* held only that *Cubias* does not extend to consecutive sentences for non-"serious violent" felonies, because additional factfinding is a necessary prerequisite to imposition of those sentences under RCW 9.94A.589(1)(a).

Thus, RCW 9.94A.589(1)(a), which requires additional factfinding before a consecutive sentence can be imposed for a non-"serious violent" felony, is unique even in Washington. Its factfinding prerequisite applies to only certain Washington consecutive sentences.

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[8] *State v. Cubias*, 155 Wn.2d 549, 120 P.3d 929 (2005).

[9] *State v. Louis*, 155 Wn.2d 563, 572, 120 P.3d 936 (2005).

[10] RCW 9.94A.589(1)(a) defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim."

3. RCW 9.94A.589(1)(a), Which Makes Imposition of Consecutive Sentences for a Non-Serious Violent Offense "Exceptional," Is Virtually Unique Among the States

RCW 9.94A.589(1)(a), which makes imposition of certain consecutive sentences "exceptional," is also virtually unique among the states. It seems to be similar to one Ohio statute – but the Ohio courts have characterized that statute as "unique in having a rule that sentences of imprisonment shall be served concurrently." *State v. Foster*, 109 Ohio St.3d 1, 21, 845 N.E.2d 470, *cert. denied*, 127 S.Ct. 442 (2006) ("While other state courts have held that their statutes on consecutive sentences do not violate *Blakely*, Ohio appears to be unique in having a rule that sentences of imprisonment shall be served concurrently. ... Thus, except for certain enumerated statutes imposing nondiscretionary consecutive terms, judicial fact-finding must occur before consecutive sentences may be imposed under R.C. 2929.14(E)(4). ... [B]ecause the total punishment increases through consecutive sentences only after judicial findings beyond those determined by a jury or stipulated to by a defendant, R.C. 2929.14(E)(4) violates principles announced in *Blakely*.") (citations omitted); *State v. Sells*, 2006 Ohio 1859, 2006 Ohio App. LEXIS 1702 (Ohio Ct. App.) at **11-12, ¶¶18 -19 (same holding); *State v. Ballard*, 2006 Ohio 1863, 2006 Ohio App. LEXIS 1712 (Ohio Ct. App.), at **11-12, ¶ 23 (same holding).

Again, RCW 9.94A.589(1)(a) is somewhat unique among the states and it has no analog in the federal system. Its limitations apply only to certain Washington consecutive sentences.

C. PETITIONER OVERSTATES THE EXTENT OF THE CONFLICT – MOST OF THE CASES IT CITES DEALT WITH A COMPLETELY DIFFERENT SENTENCING STATUTE

The state claims that, "[t]here is a significant conflict among state and federal appellate courts on this question" of whether *Apprendi* or *Blakely* apply to consecutive sentences. Petition, p. 3. The state cites two categories of decisions as supposed evidence of the significant conflict posed by *VanDelft*.

First, the state cites a host of post-*Apprendi*, pre-*Blakely*, cases, as supposed evidence of the significant conflict between the Washington Supreme Court's decision in VanDelft and the decisions of other jurisdictions. Petition, pp. 4-5. However, post-*Apprendi* but pre-*Blakely*, most courts had ruled that *Apprendi* did not even apply to exceptional, or departure, sentences outside of a prescribed Guideline range; post-*Apprendi* but pre-*Booker*, the federal courts did not apply *Apprendi* to the federal Sentencing Guidelines at all. Thus, all of the pre-*Blakely* and pre-*Booker* decisions cited by the state (Petition, pp. 4-5) as evidence of the fact that the Washington Supreme Court's decision creates a significant conflict are irrelevant. They did not, and could not, resolve the same issue differently than did the Washington Supreme

Court; they did not even address that issue, because neither *Blakely* nor *Booker* had yet been decided.

Second, the state cites to state and federal decisions entered after *Blakely* as evidence of this supposedly significant conflict. It even cites to other decisions of the Washington Supreme Court (*Cubias* and *Louis*) as supposed evidence of this conflict. But most of those cases are inapposite, because they do not deal with a statute (like Washington's RCW 9.94A.589(1)(a)) that makes concurrent sentences the norm and consecutive sentences dependent on additional factfinding.

The state, for example, cites *State v. Senske*, 692 N.W.2d 743, 748-49 (Minn. App. 2005), *review denied*, 2005 Minn Lexis 302 (2005), for the supposed holding that *Blakely* never applies to consecutive sentences. But *Senske* was just like the Washington Supreme Court's holding in *Cubias*, so there is not conflict between the Minnesota Supreme Court and the Washington Supreme Court. In *Senske*, the defendant/appellant argued that the use of consecutive sentencing, based on a judicial finding that consecutive sentences were permissible because either current or prior offenses were "crimes against persons," violated his right to a jury trial under *Blakely*. But in Minnesota, under the applicable sentencing guideline, consecutive sentences are permitted whenever there are *prior felonies*

against a person – and the existence of prior convictions is not a matter covered by *Apprendi* and *Blakely* – or whenever there are multiple current felonies *against a person*. As the *Senske* court explained, this formed the basis for the challenge to the exceptional sentence there:

> Under the sentencing guidelines, consecutive sentencing is permissive when the court is sentencing on "[m]ultiple current felony convictions for crimes against persons," or when there is a prior felony sentence for a "crime against a person" that has not been discharged. Minn. Sent. Guidelines II.F.1., 2. Appellant argues that because the determination whether a crime is a "crime against a person" is made by the sentencing judge rather than a jury, consecutive sentencing under this provision violates his right to a jury trial under *Blakely*.

Senske, 692 N.W.2d at 746.

As the Washington Supreme Court recognized in *Cubias*, however, whether the crimes were against persons – or, in *Cubias*, against separate persons – is something that the jury itself determines. It can be gleaned directly from the charging instrument (which lists the crime and the victim) and the verdict (whether the defendant is guilty of that charged crime or not). There is nothing additional that the judge has to decide. In the *Senske* case itself, the defendant pled guilty to two violations of Minn. Stat. § 609.342, subd. (1)(g) (2002). Since that statute criminalizes sexual penetration of a child under the age of 16 with whom the actor has a "significant relationship," there is really no plausible argument that the

statute does not by its terms define a crime against a person.

Thus, Minnesota's *Senske* is virtually identical to Washington's *Cubias*. It construes a statute that allows consecutive sentences without additional factfinding by the court over and above what is established by a jury verdict or plea of guilty – that is, whether the crime was one against a person (as opposed to, say, property). The *Senske* court, like the *Cubias* court, ruled that where the statute makes such consecutive sentences available without additional factfinding, then *Blakely* protections are not triggered. (The *Senske* court, like the *Cubias* court, also made some broad statements about *Blakely* being inapplicable to consecutive sentences – but as the facts of that case show, such statements were dicta.)

In Mr. VanDelft's case, in contrast, the statute expressly prohibits consecutive sentences unless additional factfinding is done by the judge, to support an "exceptional" sentence above the standard range.

The state therefore errs in claiming that *Cubias* and *Senske* present a conflict with the holding of *VanDelft*. All they present is a different result because they are based on different statutory sentencing rules for imposing consecutive sentences.

Most of the other decisions cited by the state do not involve mandatory statutes like the one at issue here, which requires concurrent

sentences absent factfinding that makes the defendant consecutive-eligible, either. In *Marrow v. State*, 169 S.W.3d 328, 330-31 (Tex. App. 2005), *cert. denied*, 126 S.Ct. 1147 (2006), the court held that no *Blakely* concerns were implicated by consecutive sentencing. But the court said nothing about whether the trial court had been given complete discretion by the state legislature to impose consecutive sentences, or whether consecutive sentences instead depended on judicial factfinding as they did in Mr. VanDelft's case. This Texas case therefore presents no conflict with the Washington Supreme Court's decision – the Washington Supreme Court decision holds that *Blakely* is just as inapplicable to consecutive sentencing, when the underlying sentencing statute makes it so.

In fact *Vandegriff v. State*, 125 P.3d 360 (Alaska App. 2005), also cited by the state, actually supports the *VanDelft* decision. In this Alaska case, the trial judge had complete discretion to impose concurrent or consecutive sentences. That was the reason why the state Supreme Court ruled that *Blakely* did not apply there: "But under former AS 12.55.025(e) and (g), a sentencing judge's authority to impose consecutive sentences did not require proof of aggravating factors or other special factual circumstances." *Id.*, 125 P.3d at 361.[11] The natural corollary is that if the

[11] *See also id.*, 125 P.3d at 362 ("Except for prior convictions, *Blakely*

judge's authority to impose consecutive sentences did require proof of additional "aggravating factors or other special factual circumstances," then *Blakely* might apply. And that is all that the *VanDelft* court held.

The federal case cited by the state is similar. The state claims that *United States v. Dees*, 467 F.3d 847, 854 (3d Cir. 2006), came to a conclusion contrary to the conclusion reached in *VanDelft*. But in *Dees*, the Third Circuit simply held that the decision whether to impose consecutive or concurrent sentences upon revocation of probation is purely discretionary following *Booker*. Since it is discretionary, *Blakely* does not apply. That is consistent with *VanDelft*, and with the distinction that the *VanDelft* court drew between *VanDelft* and *Cubias*.

The state's citation to *State v. Abdullah*, 184 N.J. 497, 514, 878 A.2d 746 (N.J. 2005), does not help it establish a conflict, either. The court in that case noted that there was no statutory presumption in favor of either concurrent or consecutive sentences, instead leaving that in the discretion of

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declares that when a judge's sentencing authority rests on facts not established by a guilty verdict or by the defendant's plea or by the defendant's express concession, the facts must be proved to a jury beyond a reasonable doubt. But Judge Thompson's authority to impose consecutive sentences did not depend on proof of additional facts. His authority to impose consecutive sentences was governed by former AS 12.55.025(e) and (g). Except for exceptions not applicable here, those subsections gave Judge Thompson the discretion to impose the sentences consecutively or concurrently.").

the court. Since there was no statutory maximum exceeded by the consecutive sentences in that case, there was no Sixth Amendment or *Blakely* issue.[12] That is just the opposite of what occurred in *VanDelft*, where the RCW 9.94A.589(1)(a)'s statutory maximum was exceeded.

The state then cites *People v. Black*, 35 Cal.4th 1238, 1261-64, 29 Cal. Rptr.3d 740, 113 P.3d 534 (Cal. 2005), as a case directly conflicting with *VanDelft*. The short answer to this is that the decision in *VanDelft* was vacated and remanded for further proceedings in light of *Cunningham v. California*, 127 S.Ct. 856 (Jan. 22, 2007), a decision applying *Blakely*. *Black v. California*, 127 S.Ct. 1210 (Feb. 20, 2007). The California Supreme Court has asked the parties on remand to brief whether the consecutive sentence holding in *Black* survives this Court's decision in *Cunningham*.[13]

In any event, California statutes, like the vast majority of state statutes, appear to give trial courts unlimited discretion to impose consecutive sentences, regardless of whether they find any facts beyond those encompassed in the guilty verdict. The California statute at issue in

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[12] There are judicially imposed limitations on running sentences consecutively but, according to *Abdullah*, no legislative limits.

[13] Order entered Feb. 21, 2007, *People v. Black* (Cal. S.Ct. No. S126182).

Black simply directs courts to consider whether any aggravating or mitigating factors are present before imposing consecutive sentences; it does not, in contrast to the statute at issue in *Cunningham*, require courts to find an aggravating fact in order to impose consecutive sentences; it leaves discretion in the hands of the judge. *Black*, 35 Cal.4th 1238, 1261-62; Cal. Penal Code § 669.

The state gets closer to presenting a conflict with the Indiana and Oregon cases it cites, but even here, the conflict is not full blown. In *Smylie v. State*, 823 N.E.2d 679, 686 (Ind. 2005), *cert. denied*, 126 S.Ct. 545 (2005), cited by the state, the court ruled that imposition of consecutive sentences did not trigger *Blakely* protections. But the prerequisite to imposition of consecutive sentences there was not legislatively imposed, but judicially imposed.[14]

The only case cited by the state presenting a direct conflict with *VanDelft* appears to be the decision of the Oregon Court of Appeals in *State v. Tanner*, 210 Or. App. 70, 150 P.3d 31 (Ore. App. 2006). This is far from

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[14] *Id.*, 823 N.E.2d at 686 n.8 ("Ind. Code. Ann. § 35-50-1-2(c) (West 2004) provides that aggravating and mitigating circumstances may be a consideration in imposing concurrent or consecutive sentences. Indiana's caselaw has developed to make an aggravating circumstance a requirement before a consecutive sentence may be imposed. *See Shippen v. State*, 477 N.E.2d 903, 905 (Ind. 1985); *Mott v. State*, 273 Ind. 216, 220, 402 N.E.2d 986, 988 (1980).").

the "significant conflict among state and federal appellate courts on this question" that the petition promised.

D. THE QUESTION PRESENTED HAS NO ONGOING SIGNIFICANCE, BECAUSE WASHINGTON, OREGON, OHIO AND INDIANA – THE ONLY STATES WITH DECISIONS THAT ARGUABLY CONFLICT – HAVE ALL CHANGED THEIR SENTENCING LAWS.

Further, any potential conflict identified by the state has little ongoing significance. The only decisions close to presenting a direct conflict, based on the summary in Section C above, are the decisions from Washington and Ohio on the one hand, and the decisions from Oregon and Indiana on the other hand.

This issue is unlikely to recur in Oregon for two reasons. First, in 2005, after the *Tanner* defendant was sentenced, the Oregon legislature enacted SB 528[15]. It amended Oregon's sentencing laws in response to *Blakely* by requiring judicial factfinding beyond a reasonable doubt of any "enhancement fact" triggering a sentence above a statutory maximum; it did not exempt consecutive-sentence findings under ORS 137.123(5).[16] Second,

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[15] http://www.leg.state.or.us/05reg/measpdf/sb0500.dir/sb0528.en.pdf

[16] "Under SB 528, an 'enhancement fact' is a 'fact that is constitutionally required to be found by a jury in order to increase the sentence that may be imposed upon conviction of a crime.' ... An enhancement fact that relates to a charged offense, must be submitted to a jury, unless a defendant waives a jury determination of that fact." *State v. Upton*, 339 Or. 673, 677, 125

in that same year, the Oregon Supreme Court ruled that sentencing statutes previously on the books as well as new SB 528 authorized trial courts to empanel juries to determine "enhancement facts." *State v. Upton*, 399 Or. 673, 677; *State v. Sawatzky*, 339 Or. 689, 125 P.3d 722 (Or. 2005). Hence, the issue of the legality of judicial determinations "enhancement facts" triggering consecutive sentences might never arise again in Oregon.

The conflict should not arise again in Indiana, either – the other state identified in the petition as arguably presenting a direct conflict with Washington. "Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. *See* Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3." *State v. Howell*, 859 N.E.2d 677, 681 n.3 (Ind. Ct. App. 2006). Since judges now have complete discretion to impose consecutive or concurrent sentences, any conflict posed by the *Smylie* decision (cited by the state) has likely disappeared now.

On the other hand, the Ohio Supreme Court's decision on this issue was in harmony with *VanDelft*. But that decision will have limited effect in Ohio. When *State v. Foster*, 109 Ohio St.3d 1, ruled that *Blakely* applied to consecutive sentences where state statute made prior factfinding a prerequisite to the consecutive sentence, it also imposed a remedy; the

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P.3d 713 (Or. 2005) (citing Or. Laws 2005, ch. 463, § 1(2) and 3).

Foster decision adopted a *Booker*-type remedy for Ohio. Ohio judges now have absolute discretion to sentence anywhere up to the statutory maximum, and to sentence concurrently or consecutively, without any additional findings. Since prior factfinding is no longer a statutory prerequisite to imposition of exceptional or consecutive sentences in Ohio, no *Blakely* issue concerning consecutive sentences will arise again there. *Id.*, 845 N.E.2d at 497 ("The following sections, because they either create presumptive minimum or concurrent terms or require judicial fact-finding to overcome the presumption, have no meaning now that judicial findings are unconstitutional: R.C. 2929.14(B), 2929.19(B)(2), and 2929.41. These sections are severed and excised in their entirety, as is R.C. 2929.14(C), which requires judicial fact-finding for maximum prison terms, and 2929.14(E)(4), which requires judicial findings for consecutive terms. R.C. 2953.08(G), which refers to review of statutory findings for consecutive sentences in the appellate record, no longer applies.").

The *VanDelft* decision itself will likely have little further significance in Washington. Following *Blakely*, Washington also amended its sentencing laws. Of note to this case, on April 15, 2005, it enacted RCW 9.94A.537 and amended RCW 9.94A.535 – which is cross-referenced by RCW 9.94A.589(1)(a) – to require jury factfinding beyond a reasonable doubt

(rather than judicial factfinding by a preponderance of the evidence, as the statute on the books at the time of the *VanDelft* case required) of any fact used to impose an exceptional sentence. If VanDelft were sentenced for the first time today, he would likely be subject to those beyond-a-reasonable-doubt and judicial decisionmaker protections, even without application of the *Blakely* decision.

Further, on January 25, 2007, the state Supreme Court decided *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007). *Pillatos* held that before the enactment of the legislation responsive to *Blakely*, trial courts lacked statutory authorization to structure their own jury-sentencing procedures; but the new *Blakely*-compliant legislation could now be applied even to some crimes occurring before the date of its enactment (as long as other statutory, procedural, prerequisites to aggravating factor sentencing, such as notice, had been observed), and if neither trials nor guilty pleas had occurred before April 15, 2005.

Then, on April 19, 2007, the legislature covered a matter left open after *Pillatos*. It passed a EHB 2070[17], a bill stating that it will permit a sentencing court to empanel a jury to find certain aggravating facts, on remand, "[i]n any case where an exceptional sentence above the standard

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[17] http://www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Bills/House%20Passed%20Legislature/2070.PL.pdf

range was imposed and where a new sentencing hearing is required." The state would likely argue that this makes Washington's *Blakely*-responsive legislation (enacted two years earlier) applicable even to cases where the trial or plea occurred before the effective date of that act (4/15/05).

New legislation or court decisions therefore strip this issue of ongoing significance in the only four states arguably presenting conflicting decisions on this issue.

E. THE SUPPOSED CONFLICT WITH OREGON MAY DISAPPEAR BECAUSE THE DEFENDANT IN THAT CASE HAS ASKED THE OREGON SUPREME COURT FOR REVIEW.

Finally, any potential conflict might disappear completely in Oregon. The defendant in *Tanner* – identified by the state as presenting a direct conflict with *VanDelft* – has asked the Oregon Supreme Court to review his case. *State v. Tanner*, 210 Or. App. 70, 150 P.3d 31 (2006), *petition for review filed*, S 054471 (Jan. 19, 2007). If that court agrees with the Washington and Ohio Supreme Courts that factual findings necessary to impose consecutive sentences trigger *Blakely*, then the state courts will be in harmony on this issue.

//

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this ____ day of April, 2007.

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(2)

No. 06-1081

FILED
MAY 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

WILLIAM R. VANDELFT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioner, State of Washington, files this reply to address several claims in the new points raised in VanDelft's Brief in Opposition (hereinafter BIO).

First, respondent seriously misstates the record when he asserts that the Washington Supreme Court issued a Mandate instead of a Certificate of Finality in this case. The Washington Supreme Court did issue a Certificate of Finality on January 2, 2007. *See* App. 1-2. There is no Mandate in this case. The Certificate of Finality was the appropriate document to issue at the conclusion of this Personal Restraint Petition proceeding. *See* Washington Rules of Appellate Procedure 16.15(e)(2) [App. 3]. The state court issued the appropriate order.

Second, respondent claims that because the judgment of the Washington Supreme Court required a remand to the trial court for a new sentencing proceeding the case is not final. He is mistaken; the ruling of the Washington Supreme Court which petitioner challenges is final. In fact, the Certificate of Finality says just that. *See* Washington Rules of Appellate Procedure 16.15(e). App. 3. ["A certificate of finality is the written notification of the clerk of the appellate court to the trial court and the parties that the proceedings in the appellate court have come to an end."] The judgment of the Washington Supreme Court is final.

The fact that the Washington Supreme Court's decision requires a new sentencing proceeding does not make the ruling less final. The legal question at issue is whether sentencing error occurred at all. The Washington Supreme Court's decision on that legal question will not change on resentencing. This case is in the exact same procedural

posture as this Court faced when it accepted review in *Washington v. Recuenco*, ___ U.S. ___, 165 L. Ed. 2d 466, 126 S. Ct. 2546 (2006). There, as here, the Washington Supreme Court had ordered a remand for resentencing. *State v. Recuenco*, 154 Wn.2d 156, 164, 110 P.3d 188, 192 (2005). There, as here, this Court should review the significant federal question presented.

Respondent cites *O'Dell v. Espinoza*, 456 U.S. 430 (1982) (*per curiam*), for the assertion that a judgment is not final for purposes of 28 U.S.C. §1257(a) whenever a state court returns a case to a lower court. He reads that case too broadly, in a manner that would essentially preclude the government from ever seeking review in a criminal case that was remanded for a new trial. This Court has noted that the purpose of the finality rule is to preclude review of interlocutory rulings. *Jefferson v. City of Tarrant*, 522 U.S. 75, 81-82 (1997). Where further proceedings are anticipated in a lower court, there are four circumstances under which a decision is still final. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Two of those circumstances apply here. First, review of a state court ruling is appropriate where the federal issue is "conclusive" or the outcome of the case is "preordained." *Id.* at 480. That exception squarely applies here because the Washington Supreme Court remanded this case "for resentencing on count 1 concurrent with the other counts." Petition, App. 12. The outcome – a concurrent instead of consecutive sentence – is "preordained". *Cox Broadcasting* also recognized that review is appropriate where reversal of the state court ruling would preclude further litigation. 420 U.S. at 482-483. That also would be the situation here. Respondent's entire argument was predicated on *Blakely v. Washington*, 542 U.S. 296 (2004), and the claim that

Blakely requires a jury fact finding to impose a consecutive sentence. The Washington Supreme Court accepted that argument. Thus, there would be nothing more to litigate on the *Blakely* claim if this Court reverses that decision. The federal question is the only legal question in this case, and resolution of that issue ends the litigation. Review is permissible under §1257(a).

Third, respondent argues that because of "unique" state laws, many of the cases cited in the Petition are not truly in conflict with the Washington ruling. This argument, too, is flawed. Although sentencing codes vary by jurisdiction, the core issue is whether *Blakely* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), require a jury finding to impose a consecutive sentence on multiple counts. As argued in the Petition the vast majority of courts have held that a separate jury finding is not required by *Apprendi* and *Blakely* because the jury has already authorized multiple punishments by returning multiple verdicts. The conflict arises from varying interpretations of *Apprendi* and *Blakely*, not from differences in codes. This Court can resolve the conflict by granting *certiorari* in this case.

Finally, respondent misleadingly suggests that changes in Washington sentencing law apply to his case. He notes that, "If VanDelft were sentenced for the first time today," he might be subject to the 2005 amendments to Washington's Sentencing Reform Act. BIO at 27. Of course, VanDelft cannot now be sentenced "for the first time" because he has already been sentenced. More importantly, the Washington Supreme Court has recently ruled that the 2005 legislative amendments do not apply to persons such as VanDelft whose trials occurred before the

law took effect. *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007).

Whether *Apprendi* and *Blakely* require a separate jury finding when a defendant has already been found guilty of multiple offenses is a question of import and confusion across this country. Respondent's argument that states have changed their codes to address those rulings simply underscores the significance of the problem. It is not a reason to deny review.

CONCLUSION

The ordering of consecutive sentences does not fall within the scope of *Apprendi v. New Jersey* and *Blakely v. Washington*. This Court should grant review to answer the important federal question presented concerning the scope of those cases and to resolve conflicts among the state courts. Rule 10(b) and (c).

Respectfully submitted,

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THE SUPREME COURT OF WASHINGTON

In the Matter of the Personal Restraint Petition of WILLIAM RAYMOND VANDELFT, Petitioner.	**CERTIFICATE OF FINALITY** NO. 77733-1 C/A No. 23788-5-III Spokane County No. 01-1-02317-0 (Filed Jan. 2, 2007)

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Spokane County.

This is to certify that the Opinion of the Supreme Court of the State of Washington filed on November 30, 2006, became final in the above entitled cause on December 20, 2006. This cause is returned to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: No costs bills having been timely filed costs are deemed waived.

[SEAL]

I have affixed the seal of the Supreme Court of the State of Washington and filed this Certificate of Finality this 2nd day of January, 2007.

/s/ Ronald R. Carpenter
RONALD R. CARPENTER
Clerk of the Supreme Court
State of Washington

cc: Sheryl Gordon McCloud
Steven J. Tucker
Andrew J. Metts
William Raymond Vandelft
Reporter of Decisions

WASHINGTON RULES OF APPELLATE PROCEDURE

16.15(e) Certificate of Finality. A certificate of finality is the written notification of the clerk of the appellate court to the trial court and the parties that the proceedings in the appellate court have come to an end.

(1) * * *

(2) When Certificate of Finality is Issued by the Supreme Court. The clerk of the Supreme Court issues the certificate of finality twenty days after the written opinion or order disposing of the petition is filed unless a motion for reconsideration of the decision is filed. If a motion for reconsideration is timely filed, the certificate of finality shall issue upon the entry of an order denying the motion for reconsideration.